

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of A. E. HERMAN, Minor.

UNPUBLISHED

May 27, 2014

No. 318333

St. Clair Circuit Court

Family Division

LC No. 11-000314-NA

Before: MARKEY, P.J., and SAWYER and WILDER, JJ.

PER CURIAM.

Respondent J. Herman appeals by right the trial court's order terminating his parental rights to the minor child pursuant to MCL 712A.19b(3)(c)(i), (c)(ii), (g), and (j). We affirm.

Respondent argues that the trial court erred in finding that each of the statutory grounds for termination were established by clear and convincing evidence. We disagree. The petitioner bears the burden of establishing at least one statutory ground for termination by clear and convincing evidence. MCL 712A.19b(3); *In re Trejo*, 462 Mich 341, 350-351; 612 NW2d 407 (2000). We review the trial court's factual findings as well as its determination that a statutory ground for termination has been proven for clear error. *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). A finding is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made. *Id.* In conducting our review, we recognize the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it. *In re Ellis*, 294 Mich App 30, 33; 817 NW2d 111 (2011).

MCL 712A.19b(3)(c)(i) and (ii) permit a court to terminate parental rights under the following circumstances:

(c) The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds either of the following:

(i) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

(ii) Other conditions exist that cause the child to come within the court's jurisdiction, the parent has received recommendations to rectify those

conditions, the conditions have not been rectified by the parent after the parent has received notice and a hearing and has been given a reasonable opportunity to rectify the conditions, and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

These subsections require a court to assess the circumstances that led to the child's adjudication and any additional circumstances that come to light after the adjudication and determine whether those circumstances have been resolved or are reasonably likely to be rectified within a reasonable time considering the child's age. The determination of what is reasonable includes both how long it will take for the parent to improve and how long the child can wait for the improvement. *In re Dahms*, 187 Mich App 644, 648; 468 NW2d 315 (1991).

Respondent's parental rights were terminated in September 2013, considerably more than 182 days after the initial dispositional order was entered in December 2011. Respondent was required to maintain a legal source of income, obtain and maintain suitable housing, remain drug and alcohol free, submit to drug and alcohol screens, complete and follow the recommendations of a substance abuse assessment, complete and follow the recommendations of a psychological assessment, participate in parenting classes, and participate in visitation.

The principal conditions that led to the child's adjudication were respondent's physical neglect and frequent incarceration. Respondent was in and out of prison during the course of these proceedings and was due to remain on probation through 2014. He was convicted in South Carolina for soliciting a minor for sex and the terms of his probation prohibited him from being at a school or around minor children without permission. A psychological evaluation indicated that respondent did not take responsibility for his actions, presented himself in favorable light, and was belligerent and abusive in his tone, which would make it difficult to provide treatment for him. The evaluator recommended that respondent participate in mental health counseling to deal with stress and anger management issue, and attend parenting classes and counseling for single parenting and reunification challenges. Respondent completed parenting classes, but he did not attend counseling for single parenting and reunification challenges. Although he did attend anger management sessions, he failed to benefit from these sessions. The trial court did not clearly err in finding that the conditions that led to the child's adjudication continued to exist.

After the child was adjudicated a court ward, respondent began acting inappropriately with her during visits. He became overly concerned about her appearance, became obsessed with cutting her fingernails, and often had the child sit on his lap while he tickled her thighs. When visits were limited to telephone contact, respondent spoke to the child in a low sensual manner. Considering respondent's prior conviction for soliciting a minor for sex, this evidence supports the trial court's finding that other conditions existed that caused the child to come under the court's jurisdiction. Respondent complains that the trial court's finding of inappropriate "grooming" behavior was not supported by legally admissible evidence. Respondent correctly observes that where termination is sought on the basis of circumstances that are new or different from those that led to the court's jurisdiction, legally admissible evidence is required. MCR 3.977(F)(1)(b). The caseworker testified that respondent's tickling of the child's thighs was observed during visits monitored by two other workers. Although it thus appears that this testimony was based on hearsay information, respondent's counsel did not object to the testimony. Regardless, the trial court's finding of inappropriate grooming behavior was based on

a combination of several different factors, including that respondent seemed overly interested in the child's appearance, that respondent was obsessed with cutting her fingernails, and that respondent spoke to the child on the telephone in an inappropriate "breathless" and "sensual" tone. This latter conduct is supported by the foster mother's testimony describing her personal observations of respondent during visits and what she personally heard when monitoring respondent's telephone calls with the child. Thus, this testimony was legally admissible.

Considering respondent's lack of truthfulness with his probation officers and therapist, his evasiveness with regard to his sex offender registry obligations in Michigan, the fact that the psychologist found him belligerent, abusive, and difficult to treat, and the evidence that respondent did not benefit from counseling and failed to take responsibility for his actions, the trial court did not clearly err in finding that the conditions that led to the adjudication and the respondent's sexual interest in children were not reasonably likely to be resolved within a reasonable time. Accordingly, the trial court did not clearly err in finding that termination of respondent's parental rights was justified under MCL 712A.19b(3)(c)(i) and (ii).

MCL 712A.19b(3)(g) provides that the court may terminate parental rights under the following circumstances:

The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

The statute requires clear and convincing evidence of both a failure and an inability to provide care and custody. *In re Hulbert*, 186 Mich App 600, 605; 465 NW2d 36 (1990).

Respondent moved the child from Texas to South Carolina, away from her mother with whom she had a relationship, and left no contact information with the Texas court or the child's mother. He engaged in criminal conduct in both Texas and South Carolina that resulted in his incarceration and thereby prevented him from personally caring for his child. The child's mother, respondent's wife, and the minor child all stated that respondent was physically abusive. Respondent's history of dishonesty, frequent incarceration, abusive conduct, and lack of respect for authority indicate that he failed to provide proper care and custody for the child. Further, his failure to benefit from counseling and his continued failure to take responsibility for his actions indicate that there is no reasonable expectation that he will be able to provide proper care and custody within a reasonable time considering the child's age. Accordingly, the trial court did not clearly err in finding that termination of respondent's parental rights was also justified under MCL 712A.19b(3)(g).

MCL 712A.19b(3)(j) provides that parental rights may be terminated if

[t]here is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.

It is clear from the evidence that respondent continues to have anger management issues. In addition to his abusive and belligerent conduct during his psychological evaluation, he was

harsh and overbearing with the child and the foster care workers. The child indicated that she was afraid to tell respondent certain things because he would get mad. The child explained that respondent frequently spanked her and she did not know why, and that he would yell at her and “just go off.” Respondent became extremely upset about the requirements of his reunification plan. Both the child’s mother and stepmother testified that respondent was physically and emotionally abusive toward them. Respondent is a convicted sex offender for soliciting a minor to have sex and he engaged in inappropriate conduct with the child during supervised visits and telephone conversations. Considering this evidence, the trial court did not clearly err in finding that termination of respondent’s parental rights was also justified under MCL 712A.19b(3)(j).

Respondent also argues that the trial court erred in finding that termination of his parental rights was in the child’s best interests. “If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child’s best interests, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made.” MCL 712A.19b(5). Whether termination is in the child’s best interests is determined by a preponderance of the evidence. *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013). In determining a child’s best interests, a court may consider a variety of factors including the child’s bond to the parent, the parent’s parenting ability, the child’s need for permanency, stability and finality, and the advantages of a foster home over the parent’s home, *In re Olive/Metts*, 297 Mich App 35, 41-42; 823 NW2d 144 (2012), as well as a respondent’s history, psychological evaluation, and parenting techniques, *In re Jones*, 286 Mich App 126, 131; 777 NW2d 728 (2009). We review for clear error the trial court’s determination regarding the child’s best interest. *In re Trejo*, 462 Mich at 356-357.

Respondent argues that termination of his parental rights was contrary to the child’s best interests because they had a bond, he was the only parent she knew, and because she suffered from attachment trauma disorder. The evidence does not support respondent’s arguments. It was respondent’s conduct of moving the child from Texas to South Carolina without permission and without providing his contact information that prevented the child from maintaining a relationship with her mother. The child was working on re-establishing that relationship and was excited about doing so. Respondent was incarcerated for much of the child’s childhood and, when he was not incarcerated, he was physically abusive toward her and her stepmother. When the child began therapy in February 2012, she lacked social skills, was behind in school, and had issues with personal boundaries and anger. The child’s therapist saw no indication that the child had a separation disorder, and the child reported that she did not want to live with respondent. Respondent has a criminal conviction for soliciting a minor to engage in sex and he engaged in inappropriate behavior with the child during visits and telephone conversations. The trial court did not clearly err in determining that termination of respondent’s parental rights was in the child’s best interests.

We affirm.

/s/ Jane E. Markey
/s/ David H. Sawyer
/s/ Kurtis T. Wilder